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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/051,846	01/17/2002	David Myatt Parker	C70334D1	3355

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EXAMINER	
KWON, BRIAN YONG S	

ART UNIT	PAPER NUMBER
1614	

DATE MAILED: 06/01/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/051,846	PARKER, DAVID MYATT	
	Examiner	Art Unit	
	Brian S Kwon	1614	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *02 February 2004*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1,3-13,22 and 27* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1,3-13,22 and 27* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☒ Certified copies of the priority documents have been received in Application No. 09/485,898.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Summary of Action

I. The rejection of claim 10 under 35 USC 112, second paragraph, will not be maintained in light of the amendment.

II. The rejection of claims 1, 3-13, 22 and 27 under 35 USC 103(a) will be maintained for the reason of the record.

Status of Application

1. By an amendment filed February 02, 2004, Claims 1, 9, 10, 12, 22 and 27 have been amended and Claims 2, 14-21 and 23-26 have been cancelled. Claims 1, 3-13, 22 and 27 are currently pending for prosecution on the merits.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

2. Claims 1, 3-13, 22 and 27 are rejected under 35 U.S.C. 103(a) as being unpatentable over DeWiile et al. (US 5597595) or Burkes et al. (US 5445837).

This rejection is analogous to the original rejection.

Response to Arguments

3. Applicant's arguments filed February 02, 2004 have been fully considered but they are not persuasive.

In response to the examiner's rejection of the claims under 35 USC 103(a), applicant alleges that neither the Burke et al. nor the De Willie et al. patents direct the skilled artisan to recognize the claimed calcium:acid molar ratio and maintenance of the final pH of the composition, and provide motivation to the skilled artisan to make necessary changes to achieve the desired effect of the claimed invention, namely reducing tooth erosion.

Applicant's argument is not persuasive at all. As the examiner indicated earlier in the previous Office Action, DeWille'595 teaches the use of 60% lactic acid or 88% lactic acid in formulating beverage composition. Although the specific embodiments of DeWille'595 does not specifically recite the beverage concentrate with 88% lactic acid, those of ordinary skill in the art would have expected that said beverage concentrate could be prepared with either 60% or 88% lactic acid, and that Example 7 could be formulated with 88% lactic aicd. When 88% lactic acid is used in Example 7, the molar ratio of the calcium to acid is 0.56 (1.39/ (1.21+1.76)) which lies inside the claimed range. Therefore, regardless of the criticality of the claimed molar ratio of the calcium to acid, one having ordinary skill in the art would be able to formulate the claimed composition without undue experimentation. Furthermore, since the instant specification defines

that the term effective pH means the pH of the composition before solidification (where the composition is prepared via a liquid phase intermediate) or the pH of the composition when reconstituted or dissolved in a liquid, e.g., water (page 2, lines 26-29), the referenced pH of liquid beverage concentrate which is prepared by mixing water with the powered beverage concentrate having the claimed calcium to acid molar ratio in Example 7 "mets and bounds" the claimed limitation of "the effective pH of the solid or semi-solid composition is from 3.5 to 4.5.

In response to applicant's argument that there is no recognition in the cited reference about the intended use of said composition for reducing tooth erosion, the examiner considers that applicant's statement of intended use or purpose is not limiting to the interpretation of the composition claims. Therefore, the cited reference(s) makes obvious the claimed invention.

Applicant has presented no evidence to establish the unexpected or unobvious nature of the claimed invention, and as such, claims 1, 3-13, 22 and 27 are properly rejected under 35 U.S.C. 103.

Conclusion

4. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37

CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

5. No Claim is allowed.

6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brian Kwon whose telephone number is (571) 272-0581. The examiner can normally be reached Tuesday through Friday from 9:00 am to 7:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Marianne Seidel, can be reached on (571) 273-0584. The fax number for this Group is (703) 872-9306.

Any inquiry of a general nature of relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (571) 272-1600.

Brian Kwon
Patent Examiner
AU 1614

VICKIE KIM
PRIMARY EXAMINER